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I. INTRODUCTION

Alone among the current Justices of the United States Supreme Court, Justice Stephen Breyer has attempted to develop a fresh direction for campaign finance jurisprudence. Other Justices have positioned themselves on one side or the other of the traditional line drawn by *Buckley v. Valeo*[1] as either more or less inclined to sacrifice speech for the "integrity of the electoral process."[2] For example, Justice John Paul Stevens has succinctly stated, "[m]oney is property; it is not speech."[3] However, Stevens has left it there, more epigram than program. Breyer suggests a better way of looking at the issue. He is the architect of a judicial strategy of broad deference to the legislature in the review of campaign finance regulation; however, that is the outcome, not the starting point, of his project.[4]

Breyer's larger aim is to defend the concept of "active liberty," which he locates at the very "core" of the constitutional conception of the democratic form of government.[5] In a significant bid to establish it as the organizing principle for a comprehensive jurisprudence, Breyer has introduced his theory of active liberty in a series of lectures,[6] a law review article,[7] and a full-length book.[8] In his exposition of active liberty, Breyer draws on campaign finance regulation to illustrate the positive application of active liberty to the adjudication of First Amendment cases. In this way, Breyer invites us to consider the assumptions under-

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1. 424 U.S. 1 (1976).

2. *Id.* at 10.

3. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

4. *See id.* at 399-405 (Breyer, J., concurring).

5. Stephen Breyer, Assoc. Justice, Supreme Court of the United States, Harvard Tanner Lectures on Human Values 2004-2005: Our Democratic Constitution (Nov. 17, 18, and 19, 2004) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html) [hereinafter Tanner Lectures].

6. *See id.*

7. *See, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

8. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) [hereinafter ACTIVE LIBERTY].

lying his notion of active liberty—assumptions about speech, participation, and the democratic process.[9] Furthermore, Breyer endeavors to explain how his theory of active liberty leads to the result he favors—a campaign finance jurisprudence that exercises wide deference to the legislature.

Breyer argues that his rationale favors "participatory self-government."[10] Understood in these terms, it seems well-suited to the purpose of campaign finance regulation: to control political money and thereby provide for a political process less susceptible to special interest influence and more open to broad public participation. On closer examination, however, there is reason to doubt that this is the dominant concern behind either active liberty or its application to the review of campaign finance regulation.

Active liberty captures a career-long concern of Breyer, one that he developed in writing as both an academic and as an appellate judge. More specifically, Breyer's concern is with the efficacy, not the democratic legitimacy, of government decision-making. Breyer hopes to connect the two by suggesting that democratic decision-making is all the more participatory if it is effective. The question is whether he has successfully demonstrated the point.

It has been suggested that, unlike the "'egalitarian influence'" rationale for campaign finance regulation, which imposes a particular "'vision of good government,'" Breyer's "self-government" rationale "does *not* entail governmental promotion of better or worse visions of democracy, but governmental preservation of the essential premise of democracy itself."[11] However, this characterization of Breyer's theory is dubious, as the meaning of "essential premise of democracy itself" is open to dispute. Therefore, like the "egalitarian influence" rationale, Breyer's rationale may also impose a particular "vision of good government." Breyer's view of regulation, as it is measured by the standards of active liberty, is not devoid of political content. In fact, although Breyer's conception of active liberty is embedded firmly in a particular substantive vision of good government, it is neither incontestable nor free of political assumptions and implications.

II. THE NATURE OF ACTIVE LIBERTY

Citing to the French political philosopher Benjamin Constant,

9. *Id.*

10. *Id.* at 46.

11. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 150 (2004) (emphasis added) (quoting Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 680 (1997)).

Breyer defines active liberty as a constitutional right to "an active and constant participation in collective power."[12] Through an emphasis on active liberty, "better law" will emerge to help "a community of individuals democratically find practical solutions to important contemporary social problems."[13] The emphasis here is on the "practical consequences" of constitutional doctrine,[14] providing support for "a government committed to democratic principle that would prove practically workable and that also, as a practical matter, would help protect individuals against oppression."[15] Therefore, active liberty must be pursued with due regard for "negative liberty," the protection of the individual from state-imposed restrictions on individual rights, such as speech rights. However, in arguing for a constructive combination of the two liberties, Breyer insists on placing the emphasis on the active version of liberty.[16]

Breyer's preference for active liberty is clear from his discussion of its historical sources. He argues that the Constitution was molded with the notion of active liberty very much on the drafters' minds. From their early experience with government, the drafters understood the imperative of making democracy "workable," and not merely responsive to the will of the people.[17] In light of this history, and critical to his argument, Breyer sees a connection between democracy and workability. Because the Constitution was written to achieve a "workable democracy," attention to practicality—"accommodating, even insisting upon, these practical needs"—is not merely a governing objective, but a democratic one demanding attention from the judiciary in interpreting constitutional text.[18]

The active quality in this form of liberty is a "source of judicial power," to be exercised in favor of legislative judgments about the requisite regulation for the democratization of politics.[19] However, it also operates as a "restraint on judicial power."[20] In this regard, the judiciary yields to legislative expertise in such matters, but does so only in the simultaneous exercise of its independent "source of judicial power," and

12. Tanner Lectures, *supra* note 5.

13. ACTIVE LIBERTY, *supra* note 8, at 6.

14. *Id.*

15. *Id.* at 27-28.

16. Tanner Lectures, *supra* note 5.

17. ACTIVE LIBERTY, *supra* note 8, at 23-28. Breyer writes of the Framers' intent "to create a form of democratic government likely to escape those tendencies to produce . . . self-destructive public policies . . . a form of democratic government that could produce legislation that would match the needs of the nation." *Id.* at 28.

18. *Id.* at 34.

19. Tanner Lectures, *supra* note 5.

20. ACTIVE LIBERTY, *supra* note 8, at 6.

as "actors in the deliberative process" which is the goal of participatory self-government.[21] Upon concluding that the Constitution is a veritable "blueprint" for active liberty, the judiciary may, through the act of deference, empower the legislature to promote it.[22] As such, the judiciary and the legislature work jointly to shape an informed dialogue among citizens about the formation of public policy.

The notion of expertise plays a large part in the active conception of democratic politics. The judiciary contributes its overarching interpretation of the constitutional requirements of democratic governance while the legislature, expert in political realities, establishes a regime of controls needed to preserve public participation in politics.[23] Under this model, even the participating citizenry are assumed to study hard for their role and to participate in the dialogue on an informed basis.[24]

In matters of campaign finance, the legislature may properly take into account the increased cost of politics, which results in the dominant role of large contributors and thereby causing "the public [to] lose confidence in the political system and become less willing to participate in the political process."[25] Controls placed on political money serve to democratize political endeavors, "thereby building public confidence in [the electoral] process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation."[26] In this state of affairs, public participation seems to consist of access to an "open public political conversation" and an "exchange of information and ideas."[27] It is this informed participation by the citizenry that will enhance the prospects for an informed public policy.[28] The legislature, "comparatively expert" in the politics of money and its effects on public trust in government, may therefore act to facilitate such an informed conversation.[29]

III. Active Liberty and Breyer's Conception of Rational Government

In *Active Liberty*, Breyer concludes his discussion of the First Amendment by stating: "The active liberty reference helps us to preserve speech that is essential to our democratic form of government,

21. Tanner Lectures, *supra* note 5.
22. *Id.*
23. *Id.*
24. *Id.*
25. Active Liberty, *supra* note 8, at 44-45.
26. *Id.* at 47.
27. *Id.*
28. *Id.*
29. *Id.* at 49.

while simultaneously permitting the law to deal effectively with such modern regulatory problems as campaign finance and product or workplace safety."[30] The Justice treats here, as members of the same class of "modern regulatory problems," campaign finance and product or workplace safety. Breyer has suggested that his theory of judicial review of regulatory activity is a "general form of analysis" that may be applied to a wide range of problems.[31] How he views the solution of "modern regulatory problems" bears directly, then, on his analysis of the constitutional theory at work in the application of "active liberty" to campaign finance regulation.

A. *Breaking the Vicious Circle*

Although Breyer has written at length about these views in numerous books[32] and articles, of particular import is *Breaking the Vicious Circle*, in which he critiques the contemporary regulatory regime.

As one commentator has noted, Breyer's approach has been one "advocating more science and less politics" in the diagnosis and treatment of regulatory problems.[33] The vicious circle that Breyer identifies is formed by a circuit of misinformation and mismatch beginning with an ill-informed public, proceeding to a politically-motivated legislature chronically oversensitive to public pressure, and ending with a bureaucracy acting on uncertain science.[34] Breyer suggests that the solution may lie in an elite corps of experts in the executive branch.[35] Such a group of experts, trained in science, economics, and administration, may apply its expertise with full authority while being insulated from political pressures.[36] At the time of writing *Breaking the Vicious Circle*, Breyer was concerned with competent and rational decision-making in an "era of political fragmentation,"[37] for the benefit of a public broadly distrustful of expertise, but also lacking data or the means to weigh it in making technical judgments about regulatory risk.[38] This trust, Breyer insists, can only be restored by equipping the government to do its job well through the recruitment, empowerment, and protection from political pressure of an apolitical cadre of experts.

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30. *Id.* at 55.

31. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION ix (1993) [hereinafter BREAKING THE VICIOUS CIRCLE].

32. *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM (1982); BREAKING THE VICIOUS CIRCLE, *supra* note 31.

33. Lisa Heinzerling, *Political Science*, 62 U. CHI. L. REV. 449, 450 (1995) (book review).

34. BREAKING THE VICIOUS CIRCLE, *supra* note 31.

35. *Id.* at 59-61.

36. *Id.*

37. *Id.* at 80.

38. *Id.* at 36.

Breyer's concern with expertise is directly related to his insistence on respect for facts and for close empirical study of social or economic problems. Writing with admiration of Justice Louis Brandeis' passion for facts, Breyer reaffirms the "lasting truth[ ]," demonstrated in Brandeis' writing, that the legislature has a "comparative advantage when it comes to investigating the facts, understanding their relevance, and finding solutions . . . ."[39]

This is the route by which Breyer arrives at his preference for deference to legislatures in seeking solutions to regulatory problems. Legislatures possess expertise that the judiciary lacks and can investigate facts to fashion acceptable solutions.[40] The judiciary must respect this capacity while keeping it within constitutional bounds. According to Breyer, "[t]he job of the Court is to keep legislatures on the Constitutional rails, deferring to legislators' judgments whenever fundamental individual liberties are not seriously threatened."[41]

In his discussion of risk regulation in *Breaking the Vicious Circle*, Breyer determines that rational collection and assessment of certain types of regulatory problems require expertise.[42] He recognizes that while the goal of a rational assessment of the facts may be required in the treatment of all regulatory problems, the means by which it is met will have to differ.[43] So Breyer suggests that an elite corps of civil servants is needed for the treatment of certain regulatory problems,[44] those of risk regulation, which Congress is ill-suited to manage directly.[45]

This capacity for rational policy-making, informed by expertise, appeals to Breyer.[46] Above all, in his quest for a resolution of regulatory problems, Breyer seeks the application of reason. He highlights for his reader this statement of Justice Brandeis in *New State Ice Co. v. Liebmann*: "But, in the exercise of this high power [of judicial review], we must be ever on our guard, lest we erect our prejudices into legal principles. *If we would guide by the light of reason*, we must let our minds be

39. Stephen Breyer, *Justice Brandeis as Legal Seer*, 42 BRANDEIS L.J. 711, 718 (2004).

40. ACTIVE LIBERTY, *supra* note 8, at 49.

41. *Justice Brandeis as Legal Seer*, *supra* note 39, at 718.

42. ACTIVE LIBERTY, *supra* note 8, at 61-62.

43. *Id.* at 62.

44. *Id.* at 59.

45. *Id.* at 42, 57.

46. Breyer notes, among the "truths" established by Brandeis' work, the "democratic preference for solutions legislated by those whom the people elect." *Justice Brandeis as Legal Seer*, *supra* note 39, at 717-18. But this is the last in the series of truths he cites, independent of the autonomous basis for deference in the legislature's fact-finding capacity, even as he acknowledges that the Court must examine legislative behavior for signs of self-interested conduct. *Id.*

bold."[47]

This broad theory of regulation, or of the role of the judiciary in aiding competent regulatory measures, has shaped Breyer's specific positions on various questions of administrative law. These merit consideration, as they bring out in clear terms the consistency and strength of his convictions leading to his development of the concept of active liberty. In writing about judicial review of administrative agency action, Breyer has addressed the distinction drawn between questions of law and questions of policy, examining what he believes to be the peculiar view that courts should defer to agencies on matters of law while second-guessing them on judgments of policy.[48] Breyer states that questions of law should be reviewed by a flexible standard, with attention to solving the particular problem in any given case; he does not believe that it is efficient or sensible to allow disputes over "trivial" points of law to stand in the way of prompt resolution.[49] Remanding an issue for agency analysis can become a mere waste of time, adding to a proceeding "unnecessary lapses of delay, complexity and procedure."[50] On the other hand, a question of policy is best left to an agency, which has a keener appreciation for reaching compromise among various interest groups such as suppliers, consumer groups, industry representatives, and even politicians.[51]

Therefore, for Breyer, the question faced by the courts is how to fulfill the judicial function in a way that "will lead to better administrative policy."[52] Judges need to help administer a rational, efficient process that taps into expertise where it is to be found. Judges can make judgments in cases; agencies are far better positioned to determine the direction of regulatory policy.

This perspective also accounts for Breyer's defense of the uses of legislative history.[53] Taking as the point of departure the proposition that "appellate courts are in part administrative institutions that aim to help resolve disputes,"[54] Breyer sweeps past the theoretical concerns about the reliability of legislative history as a guide to congressional intent, and defends it in simple terms as a useful tool:

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47. *Id.* at 717 (emphasis added) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)).

48. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

49. *Id.* at 380-81.

50. *Id.* at 377.

51. *Id.* at 389.

52. *Id.* at 390.

53. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861 (1992).

54. *Id.* at 847.

> [O]ne should recall that legislative history is a judicial tool, one judges use to resolve difficult problems of judicial interpretation. It can be justified, at least in part, by its ability to help judges interpret statutes, in a manner that makes sense and that will produce a workable set of laws.[55]

B. *Breyer's Judging: The First Amendment and Campaign Finance*

Breyer consistently has suggested that his theory of judicial participation in the performance of the regulatory state may be widely applicable beyond the types of public health risks that absorb his attention in *Breaking the Vicious Circle*. For example, as a Supreme Court Justice, he has introduced these considerations into his decisions, most prominently in *Nixon v. Shrink Missouri Government PAC*.[56] In an opinion authored by Justice Souter, the Court upheld the constitutionality of dollar limits imposed by the State of Missouri on contributions to state and local candidates.[57] Breyer joined the majority, authoring a concurrence in which he discussed the role of active liberty in shaping the Court's First Amendment jurisprudence.[58]

Specifically, Breyer noted that competing constitutional considerations lie on both sides of the issue before the Court: on the one side, a concern with restrictions on speech, but on the other, a concern with protecting "the integrity of the electoral process."[59] When confronted with a regulatory problem, the legislature should not be denied the tools for finding a solution, particularly where, as in the field of electoral law, the legislators possess an experience and understanding not available to judges.[60] In this case, the legislature was the expert.[61]

Breyer's characterization of the problem faced by the legislature is essential in understanding the analysis he chose to apply to the campaign finance issue in *Nixon*. Specifically, the analysis applied is the same one that he advocated in *Breaking the Vicious Circle* and other writings. In *Nixon*, Breyer notes that controls on political money aim to democratize the influence that money itself may bring to bear upon the electoral process, thereby protecting its integrity from the corruptive effect of private money.[62] For Breyer, this protectionist feature comprises "the means

55. *Id.* at 867.
56. 528 U.S. 377 (2000).
57. *Id.* at 382.
58. *See id.* at 399-405 (Breyer, J., concurring).
59. *Id.* at 401.
60. *Id.* at 402.
61. *Id.* at 403-04.
62. *Id.* The problem "arises out of the explosion of campaign costs." ACTIVE LIBERTY, *supra* note 8, at 43. These facts present the problem of public confidence and participation in the political process, for which the legislature should have the room to devise a solution.

through which a free society democratically translates political speech into concrete governmental action."[63]

Breyer relied on this larger concern for a workable government in the majority opinion in *Colorado Republican Federal Campaign Committee v. FEC*,[64] another campaign finance case. In writing for the majority, Breyer stated that parties could spend without limit for their candidates when doing so "independently" of them.[65] Breyer wrote of free political speech as an instrument for the accomplishment of successful governance, noting:

> A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a *practical democratic task* of creating a government that voters can instruct and hold responsible for subsequent success or failure.[66]

Here, Breyer once again links democratic governance with practicality, appearing to construe the constitutional law in favor of the parties in service to the "practical democratic task" in which he believes them to be engaged.[67]

These campaign finance cases indicate a doctrinal progression in the Court's campaign finance jurisprudence towards a notion of active liberty. Whereas prior campaign finance jurisprudence was more oriented toward the protection of negative liberty, more recent case law suggests a sharp turn in the opposite direction towards active liberty, with Breyer at the helm.[68] However, Breyer's focus on active liberty has not only affected his campaign finance jurisprudence, but it also has shaped his broader First Amendment jurisprudence, as he makes clear in *Active Liberty*.[69]

One such example, emphasized by Breyer in his discussion of the operation of active liberty in the realm of the First Amendment,[70] is his dissent in *Thompson v. Western States Medical Center*.[71] Notwithstanding the fact that *Thompson* involved commercial rather than campaign-related speech, Breyer endeavored to show how his notion of active lib-

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63. *Nixon*, 528 U.S. at 401.

64. 518 U.S. 604 (1996).

65. *Id.* at 608.

66. *Id.* at 615-16 (emphasis added).

67. *See id.*

68. Breyer's First Amendment jurisprudence has drawn fire from negative liberty advocates. *See, e.g.*, Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280 (2005).

69. ACTIVE LIBERTY, *supra* note 8, at 39-55.

70. *See id.* at 41.

71. 535 U.S. 357 (2002).

erty, as focused on the encouragement of democratic participation, would help clarify the issues for decision.

The plaintiffs in *Thompson*, licensed pharmacies specializing in compounding drugs, challenged the constitutionality of a federal statutory prohibition on advertising the availability of such drugs under the First Amendment.[72] The Court held that the prohibition failed First Amendment review.[73] Breyer dissented, arguing that the restriction at issue did not present a threat to the "functioning of democratic processes" but instead reflected an example of commercial speech regulation, "a democratically determined governmental decision" to protect the consumer.[74]

Later commenting on the case during a lecture at Harvard University, Breyer maintained that the First Amendment should not bar legislation that regulates speech for sound reasons based on the evaluation of facts such as "the existence of widespread prescription drug advertising, [and] the medical belief that . . . advertising pressures physicians into prescribing drugs they would not ordinarily prescribe."[75] Based on the evidence presented, Breyer concluded that Congress could reasonably find that these restrictions were justified by their broad regulatory goals, and that "a contrary view of the First Amendment standard . . . impedes . . . the workings of a democratically determined economic regulatory system."[76]

Likewise, Breyer's concurrence in *Bartnicki v. Vopper*[77] illustrates his care in avoiding sweeping construction of First Amendment protections that would thwart effective government action. The case involved the application of federal and state wiretapping statutes to media defendants charged with the receipt, transmission, and eventual publication of an intercepted cellular communication between a union negotiator and a union official during a labor dispute.[78] Citing the public interest in the subject matter, the Court held that the First Amendment barred the application of the law.[79] In concurring, Breyer wrote to express his reservation about implying a "significantly broader constitutional immunity for the media," emphasizing that his position rested on the unique facts of the case.[80] It was his principal concern to caution against any broader

72. *Id.* at 360.
73. *Id.*
74. *Id.* at 388 (Breyer, J., dissenting).
75. Tanner Lectures, *supra* note 5 (internal citations omitted).
76. *Id.* at 16; *see also* ACTIVE LIBERTY, *supra* note 8, at 51-54.
77. 532 U.S. 514 (2001).
78. *Id.* at 517-18.
79. *Id.* at 535.
80. *Id.* at 536 (Breyer, J., concurring).

rule of decision that would hamper "legislative flexibility" needed "to respond . . . to the challenges future technology may pose to the individual's interest in basic personal privacy."[81]

From these cases, it is clear that Breyer pays close attention to what he believes to be the constitutional questions on both sides of First Amendment claims raised against government regulatory action. "[I]f strong First Amendment standards were to apply across the board," he has written, "they would prevent a democratically elected government from creating necessary regulation."[82] This would "unreasonably limit the public's substantive economic (or social) regulatory choices" and would "likely exceed what any liberty-protecting framework for democratic government could require, depriving the people of the democratically necessary room to make decisions, including the leeway to make regulatory mistakes."[83]

Breyer finds the appropriate test by which the courts have guided, and should continue to guide, their decisions in this area to be what he refers to as "one of proportionality."[84] He describes it as follows:

> Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?[85]

In other words, the state's regulatory program, as reflective of the public's substantive economic (or social) regulatory choices, is balanced against the protection of individual speech rights. The sword is poised against the shield. As Breyer sees it, the successful management of regulatory problems, which may involve restrictions on speech, may be treated as a form of "speech-related benefit," since the restriction of speech may serve to advance a regulatory goal with perceived benefits to the public. The judiciary has in hand the authority to apply this test, but it is an act of both power and restraint, since speech restrictions may be upheld to support the legislature, or its delegates, in their regulatory activity.

IV. THE POLITICS OF ACTIVE LIBERTY

Breyer claims French political philosopher Benjamin Constant as

81. *Id.* at 541.
82. ACTIVE LIBERTY, *supra* note 8, at 41.
83. *Id.*
84. *Id.* at 49.
85. *Id.*

his guide,[86] but it is more what he leaves unsaid and undeveloped about Constant's thoughts that illuminates the political features of his program. According to Breyer, Constant emphasized the need for both positive (active) and negative liberty.[87] However, Constant's lecture, *The Liberty of the Ancients Compared with that of the Moderns*, on which Breyer draws, is more weighted toward a warning about the *limits* of active liberty.[88] This is where the unacknowledged political implications of active liberty—and of Breyer's adaptation of it—begin to appear.

Constant argued specifically that forms of liberty are determined by forms of social organization.[89] The active liberty of the ancient Greeks did indeed entail direct collective deliberation about matters of state, such as matters of war and peace.[90] This was made possible by the institution of slavery, which allowed slave-holding citizens to attend to public rather than private affairs.[91] Those citizens also accepted that while they were guaranteed direct involvement and, therefore, control over public life, they would have to accept regulation of private matters.[92] "As a citizen," Constant wrote, "he decided on peace and war; as a private individual, he was constrained, watched and repressed in all his movements."[93]

Large modern nation-states, preoccupied with the pursuit of commercial advantage, necessarily produced a different form of citizenship. Their larger size, the abolition of slavery (for the most part), and, more specifically, the dominant pursuit of commerce all favored a citizenship more indirectly involved in politics and less stringently restricted in their private activities.[94] Active liberty was traded for the negative kind. Constant concluded that "we can no longer enjoy the liberty of the ancients, which consisted in an active and constant participation in collective power. Our freedom must consist of peaceful enjoyment and private independence."[95] Constant did hope to preserve some part of the advantages of active liberty, but such hopes appear only at the conclusion of his essay, after some fair warning about the limits on active lib-

86. *See Our Democratic Constitution*, *supra* note 7, at 245.

87. *Id.*

88. *See* Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns: Speech Given at the Athénée Royal in Paris (1819)*, *in* POLITICAL WRITINGS 309 (Biancamaria Fontana, ed. & trans., 1988).

89. *Id.* at 310.

90. *Id.* at 311.

91. *Id.* at 314.

92. *Id.* at 311-12.

93. *Id.*

94. *Id.* at 314-15.

95. *Id.* at 316.

erty.[96] Constant also made clear that any conception of liberty is necessarily grounded in concrete social conditions, not, as Breyer would have it, in the time-independent core of a written constitution.

Therefore, Constant's writings are not a completely rousing source of encouragement for Breyer's proposed project of active liberty. Moreover, close attention to Constant's views highlights some of the political implications of active liberty. For example, Isaiah Berlin, in *Two Concepts of Liberty*, shows how a model of active liberty may come to depend upon "the rule of experts."[97] Active liberty holds out the promise of the citizen's democratic self-realization through a rational ordering of society—that is, through sound public policy. While *negative* liberty is merely freedom from state-imposed constraints, the *active* kind looks to sweep away the obstacles to the achievement of a better life. It is "liberation by reason,"[98] achieved through the exercise of State power in the name of the public good.

Berlin had in mind, of course, the extreme totalitarian examples of the tyranny of reason, but his analysis of the political implications of active liberty need not be confined to those cases. Breyer has chosen to argue his case within this line of thought, and it is not unfair—indeed it would seem necessary—to consider whether his argument's *politics* are vulnerable to a critique of roughly the same kind.

V. Concluding Comments on the Nature of Breyer's Theory of Deference

Breyer's theory of active liberty is a vision of democratic politics and governance. However, it is also a theory of constitutional judging that invites scrutiny of its political assumptions and of its implications for different views about democratic participation.

First, active liberty allows the Court to be too deferential to legislatures. It is telling that Breyer suggests that active liberty is consistent both with judicial modesty and with judicial power. In effect, under Breyer's conception of active liberty, the Court can exercise deference that goes beyond the boundaries that were once clearly established by First Amendment jurisprudence. As Breyer's analysis demonstrates, the concept of active liberty allows the Court to group political regulatory problems with those presented by environmental, consumer product, and workplace regulation. Breyer has lauded Justice Brandeis for "urging

96. *Id.* at 327.

97. Isaiah Berlin, Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31 October, 1958 (Clarendon Press 1961) *reprinted in* Four Essays on Liberty 118, 152 (1969).

98. *Id.* at 144.

deference to legislative judgments, when economic legislation and ordinary social legislation is at issue."[99] However, Breyer has gone a step farther by offering, through active liberty, the theoretical basis for still more deference when the legislation is political in character. This entrusts to the State considerable power over political speech and activity.

Second, while deference requires reliance on expertise, it is not obvious how Breyer actually defines the term "expertise" in attributing to the legislature a special capacity in political matters. Expertise generally connotes the dispassionate acquisition and use of special analytic skills. We expect the application of expertise without the contamination of self-interest. A hypochondriac with a strong interest in medicine has much to say about his body, and he is familiar with his aches and pains, the diagnoses made, and the treatment received. He may even be correct about the ailment or the treatment. However, this is not to say that he is an expert. The hypochondriac's profound interest in his health and familiarity with his care does not constitute expertise or supply any part of what is needed for it. Similarly, in reviewing campaign finance or other political regulation, the Court may say with full conviction that it will both credit the legislature with expertise *and* keep an eye on the legislature's self-interest; however, it is unclear how expertise can be claimed when self-interest calls that very claim into question.

Third, as a related point, it is curious that in other writings, particularly *Breaking the Vicious Circle*, Breyer expresses distrust about ill-considered legislative responses to ill-informed public demands, but in the treatment of campaign finance regulation, he is prepared to look the other way, to defer. Those defending extensive campaign finance regulation argue that Congress must impose stringent and extensive controls on political activity to placate a public troubled by the appearance of corruption. This too has created a "vicious circle" of public demand met with congressional action, followed by administrative agency programs, which are widely derided by the press, thereby fueling still more discontent and further demands on the legislature. It is not clear why this circle is any less "vicious." To the contrary, to the degree that it disrupts the conduct of politics and poisons public perception of its legitimacy, this kind of cycle seems even more "vicious."

Fourth, Breyer assumes that active liberty, when wielded by judges, will foster informed discussion in which all citizens will participate and exchange ideas and information. According to Breyer, active liberty moves politics toward the type of rational government that he strongly favors. Breyer apparently does not doubt the capacity and willingness of

99. *Justice Brandeis as Legal Seer*, *supra* note 39, at 719.

citizens to engage in political life on the terms he proposes, believing that "[t]oday's workers manipulate information, not wood or metal."[100] He expects that this form of politics is inclusive and is therefore also broadly democratic. However, this is only one view, and it may not appeal to those who do not believe that they can participate on equal or effective terms in an informed conversation directed by experts. Some Americans would prefer a politics pursued through organized mobilization and believe that they would be better served by arguing about interests rather than policies. When these arguments become a conversation, and rational public policy becomes the topic, they may feel that they are losing their voice—or just losing.

Finally, Breyer seems convinced that democracy is closely tied to workability. According to Breyer, institutions are more democratic in proportion to their capacity for effective action. To support this point, he makes claims about the early American experience, suggesting that we learned that democratic responsiveness had to be tempered with a concern for functionality.[101] Regardless of whether Breyer's historical analysis will command wide agreement, there are problems with his insistence that speech and association for political purposes are tolerable as long as they promote effective government problem-solving. To sustain a theory built on deference to the legislature, Breyer must ignore the question of who defines the types of problems that require the suppression of speech and association in the interests of a solution. This is not merely a problem of incumbent self-interest as Breyer seems to believe; rather, the problem goes deeper, as officeholders acting with the highest motives may feel justified in exercising powers that actually limit the space for free public speech and mobilization. The deference to the legislature advocated by Breyer represents a degree of trust in the legislative expertise unmatched by either an appreciation of its potential abuse or a feasible proposal for judicial monitoring and controls.

Thus, a major flaw in Breyer's notion of active liberty is the assumption that government activism is not merely reconcilable with liberty, but that true liberty, defined as democratic participation and trust, is not possible *without* successful, activist government problem-solving. Breyer does not accept or address the principal challenge, which is to show how, in light of experience, we should be reassured that liberty will not lose ground to activism. History, on which Breyer hopes in part to build his argument, is not as helpful to his cause as he would have us believe.

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100. ACTIVE LIBERTY, *supra* note 8, at 40.

101. *Id.* at 24, 28.